MILLS & REEVE

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private affairs

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- testamentary capacity
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- a question of trust
- maintenance after divorce
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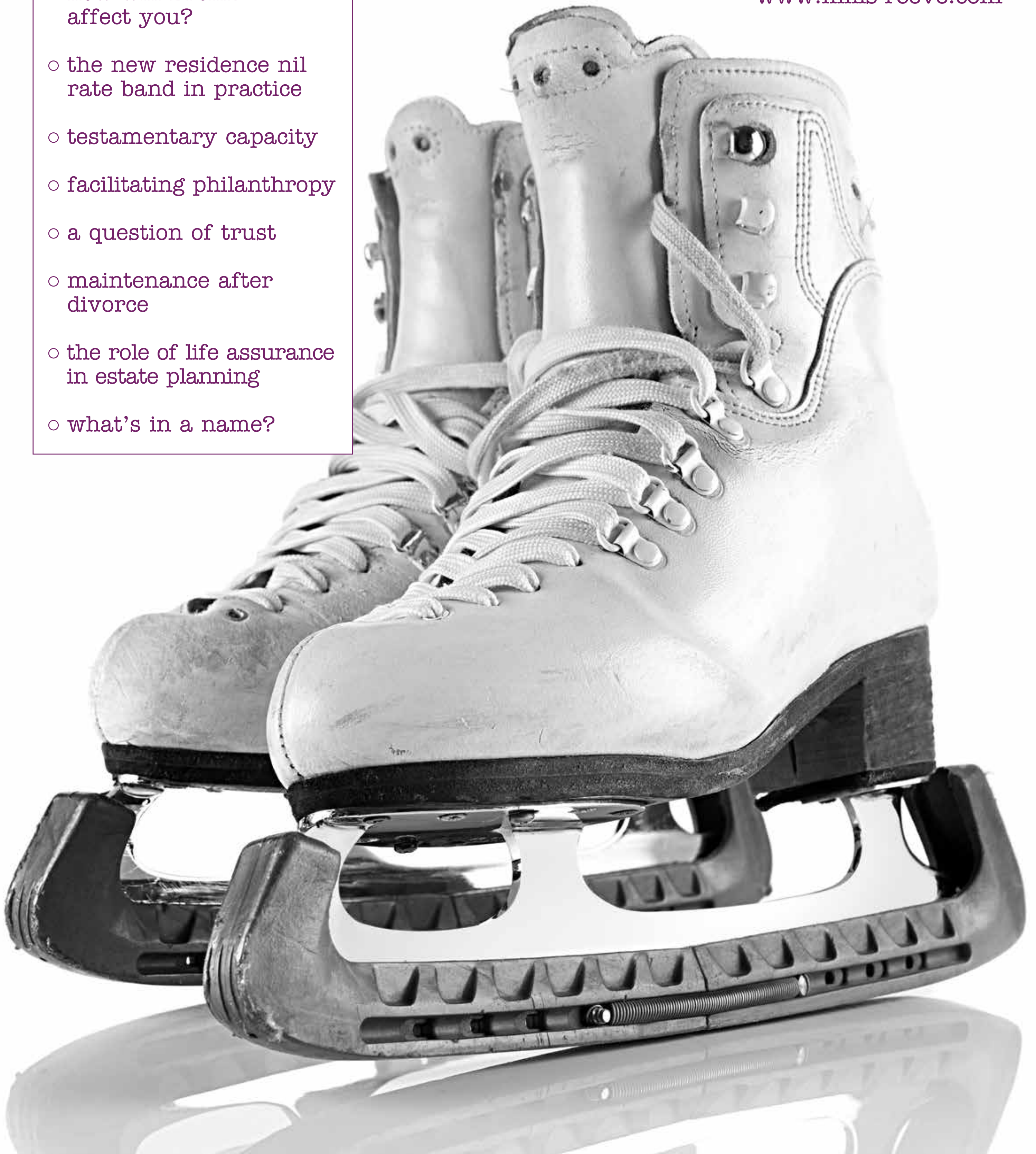

hello

welcome to the latest edition of *Private Affairs*

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editorial

Welcome to our Autumn Winter edition of *Private Affairs.*

I think you'll agree that this year has been a whirlwind with the vote on Brexit and a new Prime Minister. To keep you up to date we have a dedicated in-house team selected from all areas of Mills & Reeve, including experts from our private wealth team and our international desk to keep you abreast of any announcements and changes in legislation. Their job is to analyse the potential impact on any developments to enable our clients to make informed decisions with regards to their personal and business affairs. You can find all commentary at www.mills-reeve.com/brexit. If you do have any concerns or questions please contact us.

As a firm there have been a number of highlights over the year – we were awarded *The Sunday Times* 100 Best Companies to Work For award for the thirteenth year running. Most recently we've been ranked fourth best law firm in the UK by *Legal 500*, a professional directory that is of particular importance to us as it is based on client and peer feedback. We're particularly pleased about these accolades as it means we're acquiring and retaining the best staff and in turn, able offer clients and contacts the best service. Plus, our private wealth team was awarded the Citywealth Regional Law Firm for the third year running.

We have also just won most innovative workplace initiative at *The Lawyer's* Business Leadership Awards for our new London office Monument Place – an award that coincides precisely with the first anniversary of its opening.

On a point of administration we do issue an electronic version of *Private Affairs* on a quarterly basis. If you would prefer to receive this more regular publication by email, please email beverley.peacock@mills-reeve.com to be added to the mailing list.

I do hope you find the articles useful, informative and an interesting read. As always we welcome your feedback and ideas for topics to be covered in future issues.

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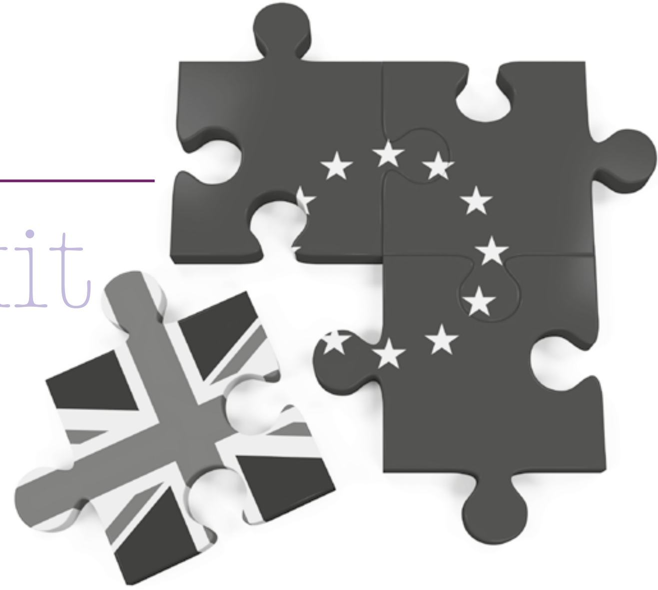

how will Brexit affect you?

The news agenda continues to be dominated by the political and economic fallout of the UK's Brexit vote. It seems that for some time uncertainty has been the only certainty, with commentators unable to agree on the likely impact of the decision. Stock markets around the world have been remarkably resilient, with the FTSE100 continuing to perform strongly on the back of overseas earning; sterling has dropped sharply against other currencies; politicians have resigned and we have a new-look government to implement the Brexit vote. So what do we think will be the effect on our clients?

Economic uncertainty will without doubt hit clients in their pockets, but market volatility is a fact of life and is unlikely to be a long term issue for most private clients. The untangling of the legal ties between the UK and Europe will have a far greater impact in the years to come.

Take, for example, our clients who are in one way or another exposed to the rural economy, which for years has benefitted from EU subsidies. The departure of the UK from Europe will mean an end to those subsidies, and representatives of farmers and landowners have already been lobbying hard for some comfort that a replacement domestic system will protect those affected.

Such clients also rely heavily on employing seasonal labourers, as do many of our mid-market business clients. Changes to the flow of labour, whatever form that takes, could have a potentially devastating impact on the operations of those employers.

Even greater might be the impact felt by businesses who export to Europe, with concern already being expressed about the volume of orders being placed by customers in Europe and longer term worries about what trade agreements the new UK government might be able to negotiate on their behalf. Their fears might in the short term be allayed because of the fall in sterling, which has hit importers harder, but the longer term effects are more difficult to predict.

All clients will be watching to see if the effect of a Brexit vote is that the Chancellor feels the need to raise taxes. Prior to the referendum the then-Chancellor George Osborne claimed that a vote to leave the EU would cost so much that income tax might have to rise by as much as eight pence. We think (and, it seems, so does Mr Osborne's successor Philip Hammond) that such a knee-jerk rise would be unnecessary. But it would be no surprise to see the recent cut in the capital gains tax rate overturned, and perhaps a change to the way inheritance tax exemptions work to raise more from that tax. We should have more idea of the new Chancellor's plans following the Autumn Statement on 23 November.

Despite all this, there will be winners to emerge. Already, a weaker pound is likely to attract more visitors to the UK this year which should help those involved in the tourism sector. And the cuts in interest rates from what was already an historic low, has been music to the ears of those clients who are borrowers rather than savers.

Inward investment into the UK also looks cheaper. Many overseas clients invest into the prime residential property market in the UK, which has for a long time looked expensive, but perhaps will now be more competitive with the major international centres around the world.

Those same overseas clients might however be waiting to see what impact Brexit has on immigration rules and the proposed changes to the taxation of non-doms: the legislation for these changes has not yet been brought in. It would be no surprise to see such changes taking even longer to become law as the Treasury grapples with more immediately pressing matters.

Whatever your view on the outcome of the referendum, I think we can all agree that the UK will never be quite the same again.

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the new residence nil rate band in practice

As explained in our September 2015 article, the new residence nil rate band (RNRB) comes into effect in April 2017. We now have the final form legislation and in this article we look in more detail at how this will operate, and factors to be considered when reviewing your wills and estate planning arrangements to ensure they are as inheritance-tax efficient as possible.

What is the Residence Nil Rate Band?

For deaths occurring after 5 April 2017, a new RNRB allowance will be available. This will mean that, together with the nil rate band (currently frozen at £325,000 until 2021), married couples will be able to leave assets with a value of up to £1 million free of inheritance tax (ignoring any other reliefs or exemptions). The allowance is being introduced in a staggered way and this, and the potential inheritance tax savings, are summarised below:

Year	Single person	Married couple	Potential IHT saving (for couple)
2017-18	£100,000	£200,000	£80,000
2018-19	£125,000	£250,000	£100,000
2019-20	£150,000	£300,000	£120,000
2020-21	£175,000	£350,000	£140,000

This is clearly a valuable allowance – but, as ever, there are conditions to be met.

How do I secure the RNRB?

For the RNRB to apply, you must die owning a “qualifying residential interest” which needs to be “closely inherited”.

A qualifying residential interest, or QRI, is an interest in a dwelling house that was the deceased person’s residence at some time during their ownership of the residential interest, and that interest is still comprised in their estate immediately before death. If your estate includes two or more QRIs, your executors will need to elect one to qualify for the RNRB.

To be “closely inherited”, the QRI must either pass to a lineal descendant outright or on certain types of trusts. Lineal descendants are broadly defined to include children, step-children, adopted children, foster children, and children in relation to whom a guardian or special guardian has been appointed.

Total permitted estate value

If your estate exceeds £2 million, there will be a tapered withdrawal of the RNRB of £1 for every £2 over the £2 million threshold. This means the RNRB will not apply where (from 6 April 2020) the value of the deceased’s estate exceeds £2.35 million or, if there is a transferable RNRB available from a pre-deceased spouse, £2.7 million. These thresholds ignore inheritance tax reliefs so, for example, those with valuable business or agricultural interests, are unlikely to benefit from this allowance.

Is it possible to carry forward any unused RNRB?

It is possible to transfer unused RNRBs between spouses. In fact, even if the first spouse died before 6 April 2017, it may be possible to secure a carried forward RNRB as the following example shows.

Mr and Mrs Smith have two children. They jointly owned a property, which automatically passed to Mrs Smith when Mr Smith died in February 2015. His estate was worth £2.1 million and his half share of the house was valued at £500,000. Mr Smith’s executors cannot claim the RNRB because he died before 6 April 2017 and, in any event, the house was not closely inherited.

However, when Mrs Smith dies in May 2020, she leaves her estate to her two children in equal shares. At her death, Mrs Smith’s house is valued at £650,000

and the total value of her estate is £900,000. Mrs Smith's personal RNRB is £175,000. She can also claim Mr Smith's unused RNRB as a brought forward allowance.

However, she cannot claim 100 per cent of Mr Smith's RNRB because, although he did not use any of it, his estate exceeded the £2 million allowance.

The legislation sets out a formula to calculate the transferable percentage, and assumes Mr Smith's RNRB was £100,000. This works as follows:

$$£100,000 - \frac{(£2.1m - £2m)}{2} = £50,000$$

(ie, 50 per cent of the assumed £100,000)

This percentage is then applied to the actual RNRB allowance at the date of Mrs Smith's death, giving a brought forward allowance of £87,500 (50 per cent of £175,000). So Mrs Smith's total RNRB is £262,500 - saving £105,000 of inheritance tax.

As with the nil rate band, there may be circumstances in which three or even four RNRBs are available to a married couple and careful planning will be needed to secure maximum benefit from these allowances.

What happens if I move to a less valuable home, or into a care home?

If you downsize to a less valuable property, or sell your home, the RNRB can still be available provided:

- The downsizing occurs on or after 8 July 2015.
- You die after 6 April 2017.
- The property would have qualified for the RNRB had it been retained.
- The replacement residence, together with assets of an equivalent value to the "lost" RNRB are left to lineal descendants.
- You sell your property and the sale proceeds, or other assets of an equivalent value, are left to lineal descendants.
- You otherwise cease to own your property and other assets of an equivalent value are left to lineal descendants.

Do I need to change my will to utilise the RNRB?

Not necessarily but it would be sensible to review your will, any letter of wishes, and the value of your estate to see whether any steps can be taken to secure the maximum available RNRB, particularly if you have been widowed, or have children from a previous marriage.

If you make no changes to your will then, under the current law, it remains possible for your beneficiaries to enter into a deed of variation after your death effectively to change the terms of your will and ensure your QRI passes to descendants, securing the RNRB. Alternatively, if your will contains a trust, and the trust assets include a QRI, it may be possible for the trustees to make an appointment to secure the RNRB.

If you prefer, it is possible to make specific provision within a will to secure the RNRB. For maximum flexibility, a QRI equivalent in value to the maximum available RNRB can be left on discretionary trusts with an expression of wishes that the trustees exercise their powers to ensure the QRI is closely inherited.

In the case of married couples, if your home is your only QRI, you might consider whether it would be appropriate for children to receive an interest in it on the first death, or whether it would be better for the RNRB to be carried forward to the second death, so that the surviving spouse has sole ownership and security during their lifetime.

If the combined value of your estates is approaching £2 million then consideration should be given to equalising the ownership of assets. Where the combined value exceeds £2 million, thought might be given to "death bed" tax planning whereby assets would be transferred away from an unwell spouse to secure the RNRB on their death. However, this needs to be balanced against the loss of benefitting from a capital gains tax re-basing on the death of the unwell spouse, which can be a reason to transfer assets to them.

This is clearly a complex area, so it is sensible to review your current will and letter of wishes, asset values and asset ownership to ensure the maximum available RNRB can be utilised in your circumstances. You should also identify whether any carried forward RNRB might be available and take advice on how to secure this. Of course, asset values and family circumstances are also constantly changing, and your will should be reviewed when any significant changes occur to ensure it remains appropriate.

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testamentary capacity

The recent Court of Appeal judgment in *Burns v Burns* is the latest on capacity to make a will. It is a salutary reminder of the importance of the "golden rule" of obtaining medical evidence when taking instructions for a new will from an elderly testator if disputes are to be avoided; and shows that someone with a poor, failing memory can nevertheless make a valid will.

The matter related to the late Eva Burns, and her will dated July 2005. Mrs Burns had two sons, Colin and Anthony. Mrs Burns owned her home (the only asset of substance in her estate) 50/50 with Colin. In her previous will, Mrs Burns left her interest in the property to Anthony. However, in her 2005 will Mrs Burns left her share of the house equally to her sons – so Colin would end up with 75 per cent of the property and Anthony just 25 per cent.

By 2003, Mrs Burns' health was deteriorating and Anthony engaged social services to assist. Various tests were carried out, which showed that Mrs Burns could not state the year, date, month or day, nor could she write a sentence. She was unable to recall three common objects mentioned a few minutes earlier.

By March 2004 Mrs Burns was attending a specialist day care centre. The manager stated Mrs Burns had dementia and was very suggestible.

A further test in May 2005 made similar findings to the 2003 tests; a contemporaneous assessment noted that Mrs Burns' "mental health was moderately impaired with medium dependency". A July 2005 report recorded: "Memory and concentration – patchy".

Mrs Burns' 2005 will was executed just three weeks after this last report, on 26 July 2005. Mrs Burns had used a new solicitor to make this will: she had written to this solicitor in 2004 stating she wanted to leave her share of her home 50/50 between Colin and Anthony. Anthony did not contest the validity of this letter. Mrs Burns did not meet or speak to the solicitor in 2004 but she met him in July 2005. The solicitor was unaware of her previous will so did not ask her to explain the change, and did not obtain a medical assessment (in line with the "golden rule").

Colin started a claim to prove the 2005 will, and Anthony predictably counterclaimed to prove the previous will on the grounds that Mrs Burns lacked capacity in 2005.

The trial judge found that the solicitor merely read her the will, she said she understood it, and it was executed – he did not ask "questions designed to test [her] faculty". A consultant geriatrician confirmed the various tests provided "good evidence that [Mrs Burns] was poorly orientated as to where she was in time and place, had poor short term memory, and problems with analysis and simple task planning."

Despite all of this, the trial judge found that the 2005 will was valid on the basis of the rule in *Parker v Felgate*: the will was prepared in accordance with instructions given when Mrs Burns had full capacity, and executed when she lacked capacity but when she realised she was signing a document implementing her instructions. Alternatively, Mrs Burns simply had adequate capacity to execute her simple 2005 will.

Anthony appealed to the Court of Appeal, contending that the judge's decision went entirely against the weight of the evidence.

The Court of Appeal considered two old American cases that state a testator with a mind that is "in some degree debilitated" with a memory "in some degree enfeebled" may still have a sound disposing mind and memory. The Court of Appeal were obviously unhappy with aspects of the original decision, but nonetheless they upheld the validity of the 2005 will. This is a striking example of how a valid will may be made by a person with an exceedingly poor memory.

It is also sobering to reflect that the appellant, Anthony, died shortly before the appeal was heard. The financial amount in question was small, and it is clear that the litigation was pursued to the bitter end on a point of principle. It is sad that his last years should have been consumed by litigation of this sort, when his time, energy and finances could have been used in many more positive ways.

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facilitating philanthropy

There are many different considerations when giving to charity: Do you have a connection to a particular cause or organisation? What is your level of engagement: a one-off legacy or a "hands on" approach? Do you want to engage the next generation? In this article we use a case study to guide you through some of the practical issues to consider before making a donation

Emma has had a successful career in retail and has recently sold her business. She now has time on her hands to start a new challenge and is not afraid of being "hands-on". Her university-age children have been provided with sufficient funds for health, housing and education, and she is conscious that her accumulated wealth should not act as a disincentive for them to make their own way in the world.

Emma wishes to donate £250,000. She has in the past sponsored friends and colleagues on a small scale but where does she start with a more sizeable philanthropy project?

Establish the parameters

What level of impact does Emma wish to make and what cause(s) does she want to support? What does she want to spend her time doing (and how much?). Does she want to invest ethically (generally lower yielding), or maximise income? Exploring these issues will help ascertain the most appropriate vehicle for Emma to use.

Set up the structure

Of course, Emma could simply make a larger one-off donation to a chosen cause. However, if Emma wishes to support a range of local charities and spend time discovering new organisations, then setting up a personal fund within a UK Community Foundation might be appropriate. Administration fees are relatively low due to economies of scale but beware of the geographical restrictions imposed by the UK Community Foundation constitution.

For true organisational control, Emma could set up her own charitable trust to which charities would make applications for grants. If she wishes to make proportionately large donations to smaller charities (by restricting applicants to a maximum turnover for example), she could be the main donor for specific projects. It is easier than ever to find out about charities' administration costs through the Charity Commission so Emma can do her homework and find out how much of her donation to any given charity would directly impact the beneficiaries.

Emma may wish to harness her knowledge of the retail sector by setting up a social enterprise which operates as a commercial business in the open market, with profits reinvested in the local community. Tax reliefs are available if certain conditions are applied and Mills & Reeve has advised on several such structures.

Administer and grow

If Emma elects to set up her own charitable trust she must decide who the trustees are going to be. Their values should be aligned with hers, but the role of trustees is to oversee governance and compliance, and ensure decisions are taken in the best interests of the beneficiaries – not just to do as Emma says. We have seen clients use charitable trusts as a way to engage the next generation and instil a family spirit of philanthropy, which would be a great way for Emma to involve her children.

Max the tax relief

Emma will want to continue to sponsor friends and family and it is important to ensure that Emma makes the most of the tax reliefs available. For example, when Emma completes the Gift Aid declaration on those Just Giving pages, she enables the charity to claim £1.25 for every £1 she donates, due to the basic-rate tax relief of 20 per cent. However, as a higher tax payer, Emma can also claim a further 20 per cent tax relief on her sponsorship – the difference between the basic rate of tax and her higher tax rate of 40 per cent. So, to maximise the tax relief, Emma should keep a record of all her ad hoc sponsorship so she can include it in her income tax return and reclaim the tax at the end of the year.

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a question of trust

On 1 April 2016 a Stamp Duty Land Tax (SDLT) surcharge was introduced for certain purchases of dwellings, such as second homes and investment properties. This works by increasing the current SDLT bands by three percentage points: so the zero per cent band becomes three per cent, two per cent becomes five per cent, five per cent becomes eight per cent and so on.

For example, the SDLT liability on the purchase of a £500,000 dwelling will increase from £15,000 to £30,000.

If the purchaser is an individual, the additional rate will apply to purchases of a "major interest" in a dwelling – a freehold or leasehold exceeding seven years where:

- The chargeable consideration is £40,000 or more.
- The new dwelling is not subject to a lease of 21+ years.
- At the completion, the purchaser owns an interest in another dwelling (anywhere in the world) which has a market value of £40,000 or more and is not subject to a lease of 21+ years.
- The dwelling being purchased is not replacing the purchaser's only or main residence.

It is important to note that for "major interest" purchases by non-individuals (eg, companies or certain trusts) only the first hand conditions above apply. Accordingly, thinking of the new three per cent charge as the "additional dwellings surcharge" is dangerously misleading: non-individual purchasers can be subject to it even if they own no other dwellings.

Where co-purchasers are acquiring a dwelling, the three per cent charge applies if any of those purchasers is caught by the rules above. Spouses and civil partners are generally looked at together so, if one of them already owns a residential interest, the surcharge will apply – even to a purchase by the other one alone. This rather draconian treatment does not apply if the spouses or partners are separated.

The new three per cent charge will apply where a chain of transactions falls through, meaning that the purchase of a new home takes place before it has been possible to sell the old property (leaving the purchaser with two dwellings temporarily). In these cases, the homeowners will clearly be caught by the "owning two residential properties on the day of completion" test, but, so long as the old home is sold within three years it will be possible to claim a refund from HMRC of the additional tax paid once the sale of the original main residence has completed. Notwithstanding the refund provisions, the initial application of the three per cent surcharge to scenarios where a chain of home acquisitions breaks down is likely to cause significant financial strain in circumstances which are already fraught.

Where a trust is involved it is important to identify the type of trust in question, as different considerations apply:

Bare trusts: Here the beneficiaries are absolutely entitled to the trust property, including where the beneficiary simply can't own the legal title for some reason (such as age or disability) or "nominee purchaser" arrangement exists. In these cases, HMRC treats the beneficiary as owning the property. So the surcharge will apply or not by reference to the position of the beneficiary.

Life or income interest trusts: For the purposes of the three per cent charge, this is where the beneficiary is entitled either to occupy the dwelling for life, or to receive the income from it. Broadly speaking these beneficiaries are treated as owning the dwelling so, if they purchase a property personally, the additional rates could apply. Because the beneficiary would be caught by these rates, any purchases by the trust are also potentially caught.

In both cases it does not matter that legal title to the trust's residential property will not be registered in the beneficiary's name, and it is also generally irrelevant whether the trustees personally own residential property interests (although parents' interests may be relevant where a minor child is involved).

Other trusts and discretionary trusts: HMRC ignores the beneficiaries and simply treats the trust as a non-individual purchaser. This means the additional rate will always apply if the trustees purchase a "major interest" regardless of whether any other residential property interests are involved.

These new rules clearly make purchases of certain dwellings more expensive than pre-April this year, and care must be taken to ensure facts are fully investigated so that purchases are correctly returned to HMRC.

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maintenance after divorce

Not so long ago, after a divorce, the higher-earning spouse would have to pay the lower earner maintenance for life. However, in the words of Bob Dylan, the times, they are a-changing in the family courts and in this article we look at how.

It is often said that our divorce courts are a bellwether for society. Certainly the decisions that Judges make about dividing assets and sharing incomes on the breakdown of a marriage or civil partnership are shaped by changes in what are perceived to be societal norms.

Until the year 2000 and the landmark divorce case of Mr and Mrs White, no matter how wealthy one of the spouses might have been, the settlement awarded to the claiming spouse (who, for linguistic ease, is referred to as "the wife") would have been restricted to her financial needs. In taking her case to the House of Lords, Mrs White changed all that and now, where the assets are more than enough to meet each person's financial needs, they tend to be shared equally on divorce. This often included maintenance for "joint lives" – broadly until first death or the wife's remarriage.

The increasingly generous provision made to wives since 2000 has led to London being hailed in many quarters, perhaps a little hysterically, as the "divorce capital of the world". However, recent decisions suggest that judges are tightening up on settlements, less frequently making joint lives maintenance orders.

An early indication that judges would not make such generous maintenance orders came in a 2011 appeal case decided by Mrs Justice King. There was just less than £3.5 million available in capital which was divided broadly equally. The first judge had ordered the wife would receive maintenance of £47,500 per annum from the husband for the rest of her life or until she re-married.

On appeal, the original judge was said to have failed, amongst other things, to have looked appropriately at the wife's current and likely future income, the husband's ability to pay the maintenance and to take proper account of the wife's capital assets from which she could meet her financial needs. The appeal judge decided that making a joint lives maintenance order had been plainly wrong and that the wife, who owned a mortgage-free farm, could (and would) become self-sufficient; and that she had a safety net of capital in the form of the farm. The appeal judge did permit a period of adjustment for the wife, ordering maintenance payable for just two years and five months.

Last year, the Court of Appeal made a decision which followed similar lines. Mrs Wright, the former wife of a racehorse veterinary surgeon, was asking for permission to appeal against an order which had been made reducing her maintenance. Lord Justice Pitchford refused Mrs Wright's request saying that she needed to get a job and stop thinking that she had the right to be "supported for life" by her former husband.

So should wives expect to have to support themselves after divorce? Judges have recently been issued with guidance on financial needs in divorce from the Family Justice Council. This guidance backs the Law Commission's aim to enable both spouses to move to financial independence on divorce but also agrees that, in a significant number of cases, independence is not possible because of age or other reasons. So, as is often the case, there are no definitive answers. However, the legal mood music does indicate that there are likely to be fewer generous maintenance awards in the future.

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the role of life assurance in estate planning

How can life assurance assist with your inheritance tax planning, and how does it compare to other options?

Individuals with sufficient wealth to be affected by Inheritance Tax (IHT) may not automatically be drawn to life assurance: many consider it expensive. However, after reading this, I hope you will be convinced otherwise.

Let's take the example of a married couple who are both resident and domiciled in the UK. The husband is aged 50 and his wife is aged 47. With typically busy lives, they have not given much consideration to how they will pass on their assets after their deaths nor their likely inheritance tax exposure.

Fast forward some years into the future to the death of the wife: her husband has already died, leaving his entire estate to her. The wife's net estate chargeable to IHT is now £1,000,000, after deducting available nil rate bands and reliefs. The liability to IHT at 40 per cent would therefore be £400,000.

Had the couple taken out life assurance, the proceeds could have been used to pay part or all of this IHT liability, permitting all (or more) of the wife's estate to pass to her beneficiaries. In order to ensure the sum assured is outside their estates (and so is not itself subject to IHT), our couple would need to take steps to hold the policy in a suitable trust. The type of trust, who should act as trustees and who should benefit from it, when and in what amounts, are all important matters for the couple to discuss with their legal advisers.

While arguments can be made for other types of life assurance, the simplest and most appropriate here is probably a guaranteed "whole of life" insurance. This type of insurance guarantees the sum assured and the premiums from the outset, so they are not subject to reviews or linked in any way to the performance of investments.

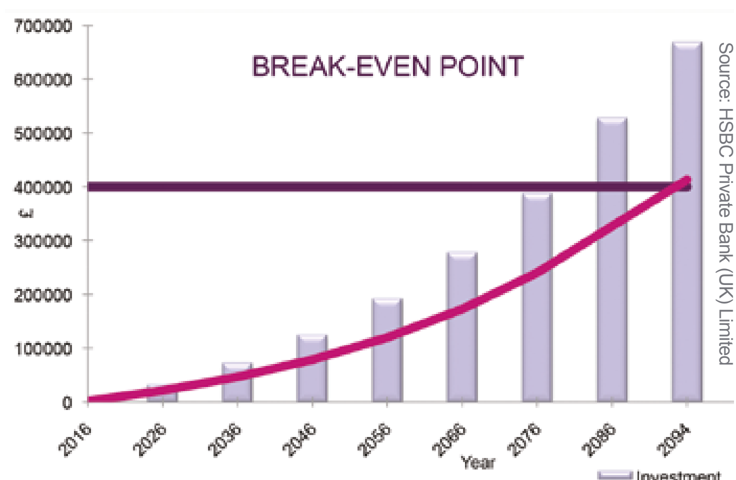
A guaranteed whole of life assurance policy on our couple's joint lives, with a sum assured payable on second death of £400,000, could cost as little as £2,852 per year.

Instead of purchasing insurance, our couple could simply invest £2,852 each year – but just how long might it take them to accumulate a fund of £400,000, after tax and after charges? The answer is a very long time. Where investors may once have had reasonable expectations of annual double-digit investment returns, in the current low interest rate, low inflation and lower investment returns environment, those sorts of expectations are probably now unrealistic.

Assuming a net investment return, after tax and after charges, of 2.5 per cent per annum, the chart below shows that it would take our couple 60 years to accumulate funds worth £400,000. By which time, if they are still alive, he will be 110 and she will be 107.

Like the insurance policy, they would need to take steps to place the investments into a suitable trust otherwise the fund would itself be liable to IHT. The pink line on the chart shows the fund after deduction of IHT at 40 per cent – to produce a £400,000 after deduction of IHT would take a further 17 years.

In a low inflation and lower investment returns environment it therefore makes sense for our couple to consider life insurance. To get the best possible outcome, they would need to discuss their options carefully with their advisers, taking into account any inherent risks in the options under consideration, as well as advice on a suitable trust structure.



This article is not intended to be and should not be construed as advice.

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what's in a name?

From Swayze to Messiah, parents have been known to bestow some unusual forenames on their children. But when is a name so extreme that the courts will intervene? We look at a recent English case, and compare this with how similar cases are approached by foreign courts.

The Court of Appeal recently upheld a decision to deny a mother her parental right to register the birth names of her eight-month-old twins. The reason? To prevent her from registering the children's names as, respectively, "Cyanide" and "Preacher".

The Court of Appeal considered the welfare of the children and their mother, and concluded that naming the baby girl Cyanide could cause the girl "significant emotional harm" at a later date. Although Preacher was considered less impactful, the court decided to change both names, as to allow one twin to keep their name and not the other could harm the children's emotional state.

The case is the first where the English courts dealt with the issue of whether a child can be harmed by a name, and a parent prevented from naming a child if there is risk of it causing significant harm. The case was very unusual as the court had to consider twins' names and how a decision over one name could affect both children. The Court of Appeal was very clear that only in exceptional cases will the English courts interfere with a parent's right to name their child. So when exactly will a court intervene?

In England, choosing a child's name and registering a child's birth are acts of parental responsibility. The statutory definition of "parental responsibility" is "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

English law does not ordinarily place restrictions on parents when it comes to naming children: registered unconventional children's names in the UK include "Peregrine", "Deniro", "Kazi" and "Timotei" to name but a few. In fact, it is pretty rare for English law to intervene in this area: judges will only do so when there is a threat of significant harm posed to the child. The Registrar of Births has discretion to not allow a name if it is offensive but, similarly, in principle will not interfere with parents' freedom in naming their child.

In contrast, a number of European jurisdictions use a "social contract" to empower their judiciaries to regulate the naming of children. For example, Iceland requires children's names to be picked from a prescribed list (though it provides over 3,500 names) and Sweden has established a "naming law" which gives the government the right to vet all children's names. In protest, a Swedish couple attempted to name their child Brfxxccxxmnpcccclllm-mnprxvclmnckssqlbb11116" (although, helpfully, this was to be pronounced "Albin").

Other examples of prohibited names include "Osama Bin Laden" (Germany), "Fraise" (France – where it means "Strawberry") and "Talula Does The Hula From Hawaii" (New Zealand).

In 2014 a French judge ruled that a child could not be called "Nutella" (after the iconic chocolate spread) as it would "make her the target of derision". However, arguably an English court hearing this case may not have made the same ruling, as derision does not necessarily equate to the English threshold of "significant harm".

However, following the Court of Appeal's decision, it is now clear that the English courts do have the power to intervene should a name pose a threat of significant harm to the child, and will not refrain from doing so. The novelty of unusual baby names will continue to draw attention and commentary, as the most popular baby names in the UK – being currently "Oliver" for a boy and "Amelia" for a girl – just aren't quite as headline grabbing, are they?

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news

Mills & Reeve at the Olympics

Denis Costello, an associate in our Norwich office, travelled to Rio for the Olympics this year. Denis coaches Ipswich Harriers athlete Katy Sealy, who was selected as a wildcard for Belize and competed in the 100 metre hurdles for the country.

And Mark Hovell, head of our sports law sector, also spent the summer at the Rio Olympics, having been selected as one of the twelve arbitrators to deal with any legal disputes arising during the games. Mark was the sole representative from the UK to join the Court of Arbitration for Sport's (CAS) ad hoc committee.